View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

Kentucky Law Journal

Volume 25 | Issue 2 Article 7

1937

The Doctrine of Banks v. State

Bert Combs
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Criminal Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Combs, Bert (1937) "The Doctrine of Banks v. State," *Kentucky Law Journal*: Vol. 25 : Iss. 2 , Article 7.
Available at: https://uknowledge.uky.edu/klj/vol25/iss2/7

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

STUDENT NOTES

THE DOCTRINE OF BANKS v. STATE[1]

Defendant while walking along the road with a party of friends fired into a moving railroad train and killed the brakeman who was at his post of duty. It did not appear that defendant or any member of the party was acquainted with any of the parties on the train or that any specific malice was directed toward deceased. Defendant was convicted of murder in the first degree. The court said, "One who deliberately uses a deadly weapon in such reckless manner as to evince a heart regardless of social duty and fatally bent on mischief, as is shown by firing into a moving railroad train upon which human beings necessarily are, cannot shield himself from the consequences of his acts by disclaiming malice."

The case is unusual only in that defendant is convicted of murder instead of manslaughter, but it is not the writer's purpose to discuss this question. It is an ancient and honorable rule of the criminal law that there can be no crime without a criminal intent.[2] It is also uniformly held that negligence may under certain circumstances suffice for criminal intent.[3] Just what degree of negligence is necessary in order to make a person criminally liable when no criminal intent is shown presents a difficult question. Since it is generally held that in regard to statutory crimes criminal intent is not a necessary element,[4] the problem of the degree of negligence necessary to supply the intent of course does not arise. In crimes other than statutory ones the majority rule is that the standard of negligence used in reference to civil actions is not applicable to the criminal law. In other words, the negligence necessary to impose criminal liability must be of a different kind than is required to impose liability in a tort action.[5] In describing negligence necessary to impose criminal liability, the courts use the terms "gross negligence", "culpable negligence", "criminal negligence", or a combination of these terms. Since these terms

---

[1] 85 Tex. Crim. Rep. 165, 211 S. W. 217 (1919).

[2] Reg. v. Tolson, 23 Q. B. D. 168 (1889); Chisholm v. Doulton, 22 Q. B. D. 736 (1889); Gordon v. State, 52 Ala. 308, 23 Am. Rep. 575 (1875); 1 Bishop Criminal Law (9th ed. 1930), p. 287.

[3] White v. State, 84 Ala. 421, 4 So. 598 (1888); People v. Falkovitch, 280 Ill. 321, 117 N. E. 398 (1917); Smith v. State, 126 Ind. 252, 115 N. E. 943 (1917); State v. Stentz, 33 Wash. 444, 74 Pac. 588 (1903).

[4] 19 A. L. R. 133; Com. v. Mixer, 207 Mass. 141, 93 N. E. 249 (1910); Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244 (1878); Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2 (1878).

[5] People v. Adams, 289 Ill. 339, 124 N. E. 575 (1919); State v. McIver, 175 N. C. 761, 94 S. E. 682 (1917); State v. Clark, 196 Iowa 1134, 196 N. W. 82 (1923); People v. Falkovitch, 280 Ill. 321, 117 N. E. 398 (1917); State v. Wright, 128 Me. 404, 148 Atl. 141 (1929).

are used synonymously in the same opinions, it is obvious that practically the same meaning is attached to the three phrases. Just what is meant by these phrases is difficult to tell. It is recognized today in the law of torts that there is no basis for distinguishing between gross or culpable negligence and ordinary negligence as a matter of law.[6] If the distinction is not necessary in the law of torts, it is difficult to see why it should be made in the criminal law. It may be said that the standard in crime and tort should be different because the objectives are not the same; that the aim of the civil law is to make reparation to the victim, while the aim of the criminal law is something different. This argument is sound if we proceed upon the assumption that the aim of the criminal law is retribution and punishment. If the objective is to mete out adequate punishment for given offenses, it necessarily follows that the intent of the party at the time of the offense is an important element. Once admitted that the intent is the important element of the crime, it also follows that the intent should not be inferred from ordinary negligent conduct, but only from negligence amounting almost in fact to an actual intent to commit the crime. But it is submitted that the primary aim of the criminal law is not to punish but to prevent and deter.[7] Assuming this to be true cannot we say that the civil law also is concerned with deterrence? The frequent assessment of punitive damages clearly shows more than a desire to make reparation to the victim. As a practical matter the necessity of having to make reparation to the victim will necessarily act as a deterrent to the offender. In so far as the civil law is concerned with deterrence it would seem that the objectives of the criminal and civil law coincide. To the extent that the objectives of the two are the same, the same standard of negligence necessary to impose liability should be used. It is not meant to infer that criminal intent is not important in the law of crimes. Moral ethics and the criminal law must of necessity go hand in hand, but "our modern objective tends more and more in the direction, not of awarding adequate punishment for moral wrongdoing, but of protecting social and public interests. To the extent that this objective prevails, the mental element requisite for criminality, if not altogether dispensed with, is coming to mean not so much a mind bent on evil doing as an intent to do that which unduly endangers social or public interests."[8] Evidently proceeding upon this hypothesis many courts have held that no greater degree of negligence is necessary to impose criminal liability than civil liability. In *State* v. *Hardie*,[9] an Iowa case, defendant unin-

[6] Harper on Torts (1933), Sec. 74: "There appears, therefore to be no legal difference between negligence and gross negligence except, as Baron Rolfe observed in Wilson v. Brett (11 M. & W. 113, 152 English Reprint 737) the addition of a vituperative epithet."

[7] Sayre, *Mens Rea* (1931), 45 Harv. L. Rev. 974, at 1019; Holmes, The Common Law (1881), 50-51.

[8] Sayre, *supra*, note 7, at 1017.

[9] 47 Iowa 647, 29 Am. Rep. 496 (1878).

tentionally killed a woman while endeavoring to frighten her with a revolver. The revolver had been found in the road some five years earlier and had repeatedly failed to fire when snapped. The defendant was convicted of manslaughter. The court said, "If you find that the death of the party was occasioned through recklessness or carelessness of the defendant, then you should convict him. And by this I do not mean that defendant is to be held to the highest degree of care and prudence in handling a dangerous and deadly weapon, but only such care as a reasonably prudent man should and ought to use under the circumstances."

In *State* v. *Tucker*,[10] a South Carolina case, defendant jokingly told his infant brother he would shoot him and told him if he did not believe him to hold out his hand. The boy held out his hand and shortly afterwards the pistol fired, killing him. Defendant was convicted of manslaughter, the court saying, "A person who causes an other's death by the negligent use of a pistol or gun is guilty of man slaughter, unless the negligence is so wanton as to make the killing murder." *State* v. *Gilliam*,[11] another South Carolina case, lays down the same test.

In *State* v. *Becker*,[12] a Delaware case, defendant was indicted for first degree murder. The defense was that the killing was accidental. The court said, "If there be any negligence or want of proper care, the loss of life or injury to the person cannot be said to be purely accidental, but partly the consequence of the default of the individual killing the other and therefore subjecting him to indictment for the casualty".

Many courts reach the same result by an indirect method. They hold that the negligence necessary to impose criminal liability must be culpable, but they define culpable negligence as being only a lack of due care under all the circumstances. In *Kent* v. *State*,[13] an Oklahoma case, defendant was indicted for murder. The defense was that the killing was accidental. The court instructed the jury that defendant was guilty of manslaughter if he was guilty of culpable negligence at the time of the killing, and defined culpable negligence as follows: "Culpable negligence is the want of that usual and ordinary care and caution in the performances of an act usually and ordinarily exercised by a person under similar circumstances."

A Wisconsin case[14] is in line. Defendant was indicted for manslaughter for killing another by hitting him with his automobile. The Wisconsin statute states that a person who causes the death of another thru his culpable negligence is guilty of manslaughter in the fourth degree. The court held that the defendant could be guilty of culpable

[10] 86 S. C. 211, 68 S. E. 523 (1910).
[11] 66 S. C. 423, 45 S. E. 6 (1903).
[12] 14 Del. Reports 411, 33 Atl. 178 (1885).
[13] 8 Okla. Cr. 188, 126 Pac. 1040 (1912).
[14] Clemens v. State, 176 Wis. 289, 185 N. W. 209 (1921).

negligence so as to satisfy the requirements of the statute, altho he was not guilty of gross negligence; and he was convicted of manslaughter. Altho the decision reaches the right result, it is apparent that this distinction between "gross" and "culpable" negligence is purely artificial and without basis. This case indicates the confusion which has arisen through the use of these terms.

In *Nail* v. *State*,[15] an Oklahoma case, defendant was indicted for manslaughter for allowing his automobile to hit and kill the deceased. The Oklahoma statute specifies that negligence sufficient to impose criminal liability must be culpable. The court in defining culpable negligence said that it is "the want of that usual and ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions". Ample authority can be found sustaining the correctness of this definition,[16] and it is submitted that when the court instructs that negligence sufficient to impose criminal liability must be culpable, and then defines culpable negligence as a lack of due care under all the circumstances, it is in effect laying down the tort standard of negligence. This seems the best method of procedure when a statute specifies that negligence must be culpable in order to supply the intent necessary for a criminal conviction. However, in the absence of a statute to this effect it would seem that the only effect of the words "culpable", "gross", or "criminal negligence" in the instruction is to confuse the jury.

There is no question but that the decision in the principal case of *Banks* v. *State*[17] is correct and in line with the present tendency in the criminal law of looking less to the intent with which an act is committed and more to the consequences of that act.

BERT COMBS.

CRIMINAL LIABILITY IN NEGLIGENCE CASES

"Criminal or culpable negligence, within the meaning of the law, is the omission on the part of a person to do some act under given circumstances which an ordinarily careful or prudent man would do under like circumstances, or the doing of some act, under given circumstances, which an ordinarily careful, prudent man under like circumstances would not do, and by reason of which omission or action, another person is endangered in life or bodily safety."[1]

In this case the owner of a small chili stand placed a gun on

[15] 33 Okla. Cr. 100, 242 Pac. 270 (1926).

[16] 2 Words and Phrases, p. 1780; Sikes v. Sheldon, 58 Iowa 744, 13 N. W. 53 (1882); State v. Emery, 78 Mo. 77, 47 Am. Rep. 92 (1883).

[17] 85 Tex. Crim. Rep. 165, 211 S. W. 217 (1919), cited note 1, *supra*.

[1] State v. Beckham, 306 Mo. 566, 267 S. W. 817, 37 A. L. R. 1094 (1924).